Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RAYLATE BROOKS, *Petitioner*

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does this Court's opinion in *United States v. Booker*, 543 U.S. ____ (2004) render Petitioner's sentence erroneous? (SUBSIDIARY QUESTION: Should this Court grant *certiorari* in this case, vacate the judgment below, and remand for further consideration in light of *Booker*?)

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PRAYER

Petitioner Raylate Brooks respectfully prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *U.S. v. Brooks*, issued on December 17, 2004. He prays in the alternative that a writ of *certiorari* issue, that the judgment be vacated, and the cause be remanded to the Court of Appeals for consideration in light of intervening authorities.

OPINIONS BELOW

On December 17, 2004, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of conviction and sentence in this case. See Opinion of the Court of Appeals in *United States v. Raylate Brooks*, 115 Fed. Appx. 738 (5th Cir. Dec. 17, 2004) (unpublished). A copy of that opinion is attached at Appendix A. A copy of the judgment of conviction and sentence of the District Court is attached at Appendix B. The District Court did not issue a written opinion.

JURISDICTION

On December 17, 2004, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of conviction and sentence in this case. See *United States v. Raylate Brooks*, 115 Fed. Appx. 738 (5th Cir. Dec. 17, 2004) (unpublished). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

At issue in this case is the Sixth Amendment to the United States Constitution, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

SUMMARY OF ARGUMENT

The Court of Appeals for the Fifth Circuit affirmed Petitioner's sentence based on its holding in *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004). *Pineiro* held that this Court's opinion and analysis in *Blakely v. Washington*, 542 U.S. ____ (2004) did not apply to the Federal Sentencing Guidelines (hereinafter referred to as the "FSG"). This issue has since been resolved against the Fifth Circuit and its decision in *Pineiro* by this Court's opinion in the case of *United States v. Booker*, 543 U.S. ____ (2005).

STATEMENT OF THE CASE[1]

A. Course of Proceedings

On March 5, 2004, after waiver of indictment, Petitioner Raylate Brooks entered pleas of guilty to two counts of an Information filed by the United States Attorney in the Fort Worth Division of the Northern District of Texas

[1] All references are to the record as it was constituted on appeal to the United States Court of Appeals for the Fifth Circuit. That record is cited as follows: (R. [Volume number][Page number]).

before United States District Judge John McBryde. R., Vol. 2, pp. 3-54. Count 1 of the Information charged Petitioner with entering into a scheme with the co-defendant, Tommy E. T. Ingram, to defraud the Fort Worth Independent School District in violation of the mail fraud statute, 18 U.S.C. § 1341. Count 3 of the Information charged Petitioner with knowingly subscribing to a false income tax return in violation of 26 U.S.C. § 7206(1).

Petitioner was sentenced on June 25, 2004 before Judge McBryde in Fort Worth. Petitioner was sentenced to the maximum 60 months imprisonment on Count 1 and the maximum 36 months imprisonment on Count 3, the sentences to run consecutively, and restitution was imposed in the amount of $15,900,000. Petitioner also received a 3 year term of supervised release on each count to run concurrently. R., Vol. 3, pp. 3-87. Petitioner timely filed his Notice of Appeal of the sentence imposed. A copy of the

Judgment and sentence entered by the District Court is attached hereto at Appendix B.

The United States Court of Appeals for the Fifth Circuit summarily affirmed Petitioner's sentence on December 17, 2004. *United States v. Raylate Brooks*, 115 Fed. Appx. 738 (5th Cir. Dec. 17, 2004) (unpublished). A copy of the Fifth Circuit opinion is attached hereto at Appendix A.

B. Statement of Relevant Facts.

1. The Offense and Proceedings Below.

On March 5, 2004 Petitioner entered pleas of guilty to Counts 1 (mail fraud) and 3 (filing a false tax return) of an Information filed by the United States Attorney in Fort Worth, Texas. As a part of the plea proceedings, a Factual Resume of agreed facts was filed with the court and read into the record by the prosecutor. R., Vol. 1, p. 34; R., Vol. 2, pp. 42-49. Petitioner agreed, under oath in this proceeding, that the facts contained in the Factual Resume were true and

correct. R., Vol. 2, p. 49. There were no other admissions by Petitioner Brooks as to factual matters of the offenses during these proceedings.

There was no specific "loss" amount as to Count 1 mentioned in the Factual Resume. There was, however, a reference in the Factual Resume to the defendants Brooks and Ingram conducting "a scheme and artifice to defraud the FWISD of millions of dollars" by means of false statements and documents. R., Vol. 1, p. 37. There was no mention in the Factual Resume of the alleged conduct by Petitioner Brooks upon which the Probation Officer would later base her finding in the Presentence Report (hereinafter referred to as the "PSR") relating to "obstruction of justice" since such alleged conduct had not yet occurred. FSG § 3C1.1.

As to Count 3 of the Information, there was a "tax loss" amount of "approximately $700,505.00" set out in the Factual Resume. R., Vol. 1, p. 39.

Sentencing in the case took place on June 25, 2004 in Fort Worth, Texas. The FSG manual in effect November 1, 2000 was used for guideline calculations. PSR, p. 13, ¶ 50. The calculations are set out on pages 14 and 15 of the PSR.

The base level for Count 1 was 6. PSR, p. 14, ¶ 52. To that were added 15 levels for a loss amount of between 10 and 20 millions of dollars. PSR, p. 14, ¶ 54. Another 2 levels were added for "obstruction of justice" for Petitioner's allegedly withholding and/or misrepresenting his assets to the Court. PSR, pp.12-13, ¶ 46. The total offense level for Count 1 was 25.

For Count 3 of the Information, the base level was 19 based on the Probation Officer's calculation of a tax loss of $1,391,784.00. PSR, p. 14, ¶ 59. An additional 2 levels were added for failure to report over $10,000 received from criminal activity in a year. PSR, p. 15, ¶ 60. Another 2 levels were added for "obstruction of justice" for the same reason set out above, making a total offense level for Count 3

of 23. PSR, p. 15, ¶¶ 62 and 63. After an adjustment upward of two levels for multiple count convictions, the combined adjusted offense level was 27. PSR, p. 15, ¶¶ 64-69.

The Probation Officer denied Petitioner a 3 level downward adjustment for acceptance of responsibility solely due to the alleged "obstruction of justice" conduct of withholding and/or misrepresenting his assets to the Court as set out above. PSR, p. 15, ¶ 70. The Probation Officer's calculations resulted in a total offense level of 27, meaning that Petitioner's sentencing range was 70 to 87 months. PSR, p. 19, ¶ 100.

Both the Government and Petitioner filed objections to the PSR. Pursuant to FSG § 2F1.1(b)(6)(C), the Government requested an additional 2 levels added to the total offense level of 27 for use of "sophisticated means." See Government's Objections to PSR. This upward adjustment recommendation was accepted by the Probation Officer, and

the total level was increased to 29 and a sentencing range of 87 to 108 months. See Addendum to the PSR, pp. 1-2.

The Petitioner filed objections to the PSR, arguing that the loss number for Count 1 was excessive, that there should be no finding of "obstruction of justice" and, therefore, Petitioner should receive a 3 levels downward adjustment for "acceptance of responsibility." See Defendant's Objections and Comments to the PSR. All of Petitioner's objections were rejected by the Probation Officer. See Addendum to the PSR.

At the sentencing proceeding on June 25, 2004, the Government put on two government employees as witnesses, an IRS Agent and a CPA employed by the United States Attorney's Office. R., Vol. 3, pp. 7-25. These witnesses introduced wholly hearsay evidence relating to either records of the Fort Worth Independent School District and/or compilations and/or reviews of various audits conducted by different entities of various kinds of records relating to

construction jobs performed by Petitioner's company for the Fort Worth Independent School District. R., Vol. 3, pp. 7-25.

This "evidence" resulted in the Government coming up with a loss number of $15,932,393.00. R., Vol. 3, p. 20. The Court overruled Petitioner's objections and found, by an unstated standard of proof, that this was the loss number attributable to the Petitioner for guideline calculation purposes. R., Vol. 3, pp. 41, 42. The Court further overruled Petitioner's objection that he did not commit "obstruction of justice" and the objection relating to receipt of a downward adjustment for acceptance of responsibility. R., Vol. 3, pp. 71-72. These findings were also arrived at by an unstated standard of proof. The Court adopted the fact-findings of the PSR and found that Petitioner's total offense range was 29, with a sentencing range of 87 to 96 months and 96 months being the Title 18 U.S. Code statutory maximum. R., Vol. 3, p. 73. Petitioner offered one exhibit demonstrating that over

three million dollars in restitution had been made by Petitioner before sentencing. R., Vol. 3, pp. 68-69.

The District court sentenced Petitioner to 60 months imprisonment on Count 1 and 36 months imprisonment on Count 3, to run consecutively for a total of 96 months, and imposed restitution in the amount of $15,900,000. R., Vol. 3, pp. 81-82.

2. The Appeal.

Petitioner appealed the sentence imposed on the basis of this Court's holding in *Blakely v. Washington*, 542 U.S. ____ (2004). The District Court had based its sentencing findings as to (1) a loss of $15,900,000, and (2) obstruction of justice by Petitioner on facts neither found by a jury beyond a reasonable doubt nor admitted by Petitioner. These findings clearly violated *Blakely* if *Blakely* applied to the FSG. The Fifth Circuit had earlier held in *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004) that *Blakely* did not

apply to the FSG, and summarily affirmed Petitioner's sentence on that basis.

REASONS FOR GRANTING THE WRIT

A. This Court's opinion in *United States v. Booker*, 543 U.S. ____ (2005) rendered Petitioner's sentence erroneous.

Petitioner was sentenced on June 25, 2004, the day after this Court's holding in *Blakely, supra. Blakely* was not cited to the District Court as authority against the District Court's findings of fact that were used to enhance Petitioner's sentence. Those enhancement facts, however, were neither admitted by the Petitioner nor found by a jury beyond a reasonable doubt.

The *Blakely* issues and arguments were raised on the direct appeal to the Fifth Circuit, resulting in the summary affirmance by that Court of the matter at issue here. The Fifth Circuit based its summary affirmance of Petitioner's sentence entirely on its opinion in *United States v. Pineiro,*

supra. and its holding that "...*Blakely* does not extend to the Federal Sentencing Guidelines and that Pineiro's sentence did not violate the Constitution." *Pineiro,* at 465-466. The Fifth Circuit's short opinion in this case basically stated that Petitioner raised issues foreclosed by the *Pineiro* decision.

That issue has now been directly resolved against the Fifth Circuit and the *Pineiro* decision by this Court's opinions in *United States v. Booker, supra.* "There is no relevant distinction between the sentence imposed pursuant to the *Washington* statutes in *Blakely* and the sentences imposed pursuant to the Federal Sentencing Guidelines in these cases." *Booker*, at ____ (slip op., at 11).

In this case the Petitioner's sentence was enhanced to the maximum by findings of fact by the District Judge relating to the FSG issues of "loss" and "obstruction of justice". These "facts" found by the District Judge were neither admitted by Petitioner nor found by a jury beyond a reasonable doubt. *Booker* determined that this form of

judicial fact-finding under the mandatory federal guidelines system offends the Sixth Amendment. Therefore, *Booker* renders Petitioner's sentence erroneous.

B. GVR is appropriate.

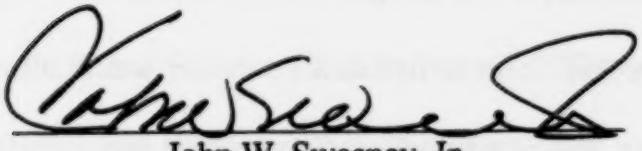
The granting of *certiorari*, vacating judgment (the sentence in this case), and remanding the case for reconsideration (GVR) in light of intervening authority does not require this Court to find that Petitioner would ultimately succeed on the merits. The Court need find only that a substantial question has been raised due to an intervening development--in this case, the *Booker* decision. See *Lawrence v. Chater*, 516 U.S. 163 (1996); *Stutson v. United States*, 516 U.S. 193 (1996).

The Fifth Circuit Court of Appeals had no opportunity to consider *Booker*'s application to the sentencing facts of this case. It should be given the opportunity to do so, and GVR would give it that opportunity. *Kubosh v. United States*, 516 U.S. 1143 (1996).

CONCLUSION

Wherefore, Petitioner Raylate Brooks respectfully prays that this Court grant *certiorari*, vacate the judgment below and remand this case for reconsideration in light of the holding in *United States v. Booker*, 543 U.S. ____ (2005).

Respectfully submitted,



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APPENDICES

APPENDIX A

[Filed on December 17, 2004]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10769
Conference Calendar

UNITED STATES
OF AMERICA,

Plaintiff-Appellee,

versus

RAYLATE BROOKS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:04-CR-46-2-A

Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges. PER CURIAM:*

Appealing the Judgment in a Criminal Case, Raylate Brooks raises arguments that are foreclosed by United States

v. Pineiro, 377 F.3d 464, 465-66 (5th Cir. 2004), petition for cert. filed (U.S. July 14, 2004) (No. 04-5263), which held that Blakely v. Washington, 124 S. Ct. 2531 (2004), does not apply to the United States Sentencing Guidelines. The Government's motion for summary affirmance is GRANTED, and the judgment of the district court is AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

[Filed on June 29, 2004]

United States District Court
Northern District of Texas
Fort Worth Division

UNITED STATES OF AMERICA	§	
v.	§	Case Number: 4:04-CR-046-A(02)
RAYLATE BROOKS	§	

JUDGMENT IN A CRIMINAL CASE

The government was represented by Assistant United States Attorney Ronald Eddins. The defendant, RAYLATE BROOKS, was represented by John W. Sweeney, Jr.

The defendant pleaded guilty on March 5, 2004 to counts 1 and 3 of the information filed on March 2, 2004. Accordingly, the court ORDERS that the defendant be, and is hereby, adjudged guilty of such counts involving the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
18 U.S.C. § 1341 & 2	MAIL FRAUD AND AIDING AND ABETTING	2000	1
26 U.S.C. § 7206(1)	SUBSCRIBING TO A FALSE TAX RETURN	May 14, 2000	3

As pronounced and imposed on June 25, 2004, the defendant is sentenced as provided in this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as amended.

The court ORDERS that the defendant immediately pay to the United States, through the Clerk of this Court, a special assessment of $200.00.

The court further ORDERS that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence address, or mailing address, as set forth below, until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court, through the clerk of this court, and the Attorney General, through the United States Attorney for this district, of any material change in the defendant's economic circumstances.

IMPRISONMENT

The court further ORDERS that the defendant be, and is hereby, committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months as to count 1 and for a term of 36 months as to count 3. The term of imprisonment as to count 3 shall run consecutively to the sentence imposed as to count 1, for a total sentence of 96 months.

The court further ORDERS defendant taken into custody by the United States Marshal.

SUPERVISED RELEASE

The court further ORDERS that, upon release from imprisonment, the defendant shall be on supervised release

for a term of 3 years as to count 1 and for a term of 1 year as to count 3. The terms of supervised release shall run concurrently with each other.

While on supervised release, the defendant shall comply with the standard conditions ordered by this Court and shall comply with the following additional conditions:

1. The defendant shall not commit another federal, state, or local crime.

2. The defendant shall not possess illegal controlled substances.

3. If, upon commencement of the term of supervised release, any part of the $15,900,000 restitution ordered by this judgment remains unpaid, the defendant shall make payments on such unpaid amount at the rate of at least $500 per month, the first such payment to be made no later than 60 days after the defendant's release from confinement and another payment to be made on the same day of each month thereafter until the restitution amount is paid in full. Any unpaid balance of the restitution ordered by this judgment shall be paid in full 60 days prior to the termination of the term of supervised release.

4. The defendant shall cooperate with the Internal Revenue Service, file all outstanding tax returns, and pay all outstanding taxes, interest, and penalties.

5. The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the probation officer makes a determination that the defendant has fully satisfied the restitution obligation.

6. The defendant shall also comply with the Standard Conditions of Supervision as hereinafter set forth.

Standard Conditions of Supervision

1. The defendant shall report in person to the probation office in the district to which the defendant is released within seventy-two (72) hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not possess a firearm, destructive device, or other dangerous weapon.

3. The defendant shall provide to the U.S. Probation Officer any requested financial information.

4. The defendant shall not leave the judicial district without the permission of the Court or U.S. Probation Officer.

5. The defendant shall report to the U.S. Probation Officer as directed by the court or U.S. Probation Officer and shall submit a truthful and complete written report within the first five (5) days of each month.

6. The defendant shall answer truthfully all inquiries by the U.S. Probation Officer and follow the instructions of the U.S. Probation Officer.

7. The defendant shall support his or her dependents and meet other family responsibilities.

8. The defendant shall work regularly at a lawful occupation unless excused by the U.S. Probation Officer for schooling, training, or other acceptable reasons.

9. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment.

10. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.

11. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the U.S. Probation Officer.

13. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the U.S. Probation Officer.

14. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

15. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

16. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to

make such notifications and to confirm the defendant's compliance with such notification requirement.

The court hereby directs the probation officer to provide defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, as contemplated and required by Title 18 United States Code section 3583(f).

FINE

The court did not order a fine because the defendant does not have the financial resource or future earning capacity to pay a fine.

RESTITUTION

The court further ORDERS the defendant shall make full restitution as to count 1, in the amount of $15,900,000. Of this amount, $12,500,000 is to be paid jointly and severally with Tommy E. T. Ingram. Restitution is payable immediately, but non-payment will not be a violation of defendant's conditions of supervised release so long as defendant pays as provided in defendant's conditions of supervised release. All restitution payments shall be made by defendant to the Clerk of the United States District Court, 501 West 10th Street, Room 310, Forth Worth, Texas 76102, for disbursement to the victim whose name and loss for which restitution is to be made is listed below:

Fort Worth Independent School District
Attn: David Chappell, Attorney for the District
2501 Parkview
Fort Worth, Texas 76110

The U.S. District Clerk shall include Ingram/Brooks file on all checks disbursed to Fort Worth Independent School District.

Signed this the _[29]_ day of June, 2004.

/S/
JOHN McBRYDE
UNITED STATES DISTRICT JUDGE

The "Statement of Reasons" and personal information about the defendant are set forth on the attachment to this judgment.

RETURN

I have executed the imprisonment part of this Judgment as follows:

_____

_____

_____

Defendant delivered on _____, 200__ to _____ at _____, with a certified copy of this Judgment.

Randy Ely
United States Marshal for the
Northern District of Texas

By _____
Deputy United States Marshall